UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,	:	
	:	08 Civ. 6978 (TPG)
Plaintiff,	:	09 Civ. 1707 (TPG)
	:	09 Civ. 1708 (TPG)
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
	:	
AURELIUS CAPITAL MASTER, LTD. and	:	
ACP MASTER, LTD.,	:	09 Civ. 8757 (TPG)
	:	09 Civ. 10620 (TPG)
Plaintiffs,	:	
	:	
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
	:	
AURELIUS OPPORTUNITIES FUND II, LLC	:	
and AURELIUS CAPITAL MASTER, LTD.,	:	10 Civ. 1602 (TPG)
	:	10 Civ. 3507 (TPG)
Plaintiffs,	:	
	:	
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
	:	**(captions continued on next page)**

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO HOLD THE REPUBLIC IN CIVIL CONTEMPT AND TO IMPOSE SANCTIONS

AURELIUS CAPITAL MASTER, LTD. and AURELIUS OPPORTUNITIES FUND II, LLC,	:	10 Civ. 3970 (TPG)
	:	10 Civ. 8339 (TPG)
Plaintiffs,	:	
v.	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	
BLUE ANGEL CAPITAL I LLC,	:	
Plaintiff,	:	10 Civ. 4101 (TPG)
	:	10 Civ. 4782 (TPG)
v.	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	
OLIFANT FUND, LTD.,	:	
Plaintiff,	:	10 Civ. 9587 (TPG)
v.	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	
PABLO ALBERTO VARELA, et al.,	:	
Plaintiff,	:	10 Civ. 5338 (TPG)
v.	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	

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Plaintiffs NML Capital, Ltd., Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC, Pablo Alberto Varela, et al., and Olifant Fund, Ltd. (collectively, "Plaintiffs"), through their undersigned counsel, respectfully submit this Reply Memorandum of Law in support of their motion to hold defendant The Republic of Argentina (the "Republic" or "Argentina") in civil contempt and to impose sanctions.

ARGUMENT

Argentina's brief in opposition to Plaintiffs' motion seeking to hold Argentina in civil contempt and to impose sanctions ("Opp. Br.") is premised on a complete mischaracterization of the relief that Plaintiffs actually seek, and relies on a series of rejected or inapposite legal arguments. And quite conspicuously, it fails to grapple with the Supreme Court's holding on June 16, 2014—in litigation arising from this very case—that rejected the position asserted by Argentina (and the United States as *amicus curiae*) that the FSIA confers immunities beyond those stated in the Act's text. To the contrary, the Supreme Court affirmed that district court's retain their traditional powers over sovereigns that have consented to jurisdiction in U.S. Courts. Argentina indisputably has consented to such jurisdiction here, and this Court therefore clearly has the authority to hold it in contempt for its repeated and blatant disregard of the Court's orders.

I. ARGENTINA MISCHARACTERIZES THE RELIEF SOUGHT BY PLAINTIFFS.

To be absolutely clear, Plaintiffs' motion is ***not*** "another attempt to require [Argentina] to pay money … unless and until [Argentina] pays plaintiffs full principal and interest on their defaulted debt …." (Opp. Br. at 1). *See also*, to the same effect, Opp. Br. at 2 ("what plaintiffs seek – to compel [Argentina] to pay them in full …."), Opp. Br. at 9

("Plaintiffs' demand that the Court hold [Argentina] in contempt and impose unenforceable, effectively indefinite monetary sanctions with which it is impossible to comply ….").) Rather, and as Plaintiffs' motion papers make perfectly clear, the only monetary relief Plaintiffs seek by this motion is the payment of attorneys' fees and a *per diem* fine to the Court so long as Argentina's contumacious conduct in disregard of the Court's orders continues.[1]

II. CONTEMPT SANCTIONS AGAINST A SOVEREIGN ARE NOT IMPROPER UNDER INTERNATIONAL LAW OR THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Argentina repeatedly points to international law and the position of the Executive Branch to support its baseless claim that contempt sanctions against a sovereign are "legally improper not only under international law and practice, but under the Foreign Sovereign Immunities Act." Opp. Br. at 1. These arguments fail on all grounds.

First, the Supreme Court has repeatedly made clear – including in this very litigation – that sovereign immunity is a question to be "***decided by the courts***" based on the FSIA. *Republic of Argentina v. NML Capital*, 134 S. Ct. 2250, 2256 (2014). It is *not* a question

[1] As set forth in Plaintiffs' initial brief (at pages 8-13), Argentina expressly and deliberately attempted to make the June 30 payment due on the Exchange Bonds without making a Ratable Payment to Plaintiffs in direct violation of Paragraphs 2(a) and 2(d) of the Amended Ferbuary 23, 2012 Orders -- and then derided the Court's rulings and orders condemning Argentina's illegal behavior with respect to the attempted June 30 payment as "whimsical and absurd." Argentina also repeatedly violated the "anti-evasion" provision of the Amended February 23, 2012 Order (i.e., Paragraph 4) as well as the June 20, 2014 Order and the rulings and directives of the Court issued on August 1, 2014, August 8, 2014 and August 21, 2014, through both its continued "false and misleading statements" and the several "legal notices" it caused to be published in various newspapers that disclose the steps that Argentina has taken purportedly to remove BNY as Trustee for the Exchange Bonds in direct violation of the Order's prohibition against "altering or amending the process or specific transfer mechanism by which it makes payments on the Exchange Bonds without prior approval of the Court."

for the Executive, or one determined by reference to international law.[2] Thus, the Supreme Court recognized:

> Congress established in the FSIA a comprehensive framework for resolving any claim of sovereign immunity. . . . For the better part of the last two centuries, the political branch making the determination [of foreign sovereign immunity] was the Executive, which typically requested immunity in all suits against friendly foreign states … Congress abated the bedlam in 1976, replacing old executive-driven, factor-intensive, loosely common-law based immunity regime with the Foreign Sovereign Immunities Act's 'comprehensive set of legal standard governing claims of immunity in every civil action against a foreign state.' The key word there—which goes a long way toward deciding this case is ***comprehensive*** … As the Act itself instructs, '[c]laims of foreign states to immunity should henceforth be ***decided by courts … in conformity with the principles set forth in this [Act].' Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.***

Id. at 2255-56 (2014) (emphasis supplied).

Second, and in any event, international law does not provide that contempt sanctions against a sovereign are "legally improper." While Argentina points to the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "Convention"), which states that "no fine or penalty shall be imposed on [a] State by reason of [its] failure or refusal" to comply with a court order, to support its position, as Argentina reluctantly admits, the Convention "***is not in force and the United States is not a signatory to it.***" Opp. Br. at 3. Accordingly, this "Convention" has no weight of law. Indeed, as explained in

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[2] In cases in which the United States has filed supporting briefs arguing that contempt sanctions cannot be entered against a sovereign, courts have routinely rejected its positions. *E.g.*, *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011); *Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148 (D.D.C. 2013); *Belize Telecom Ltd. v. Government of Belize*, No. 05 Civ. 20470, 2005 U.S. Dist. LEXIS 18592 (S.D. Fla. Apr. 12, 2005). Indeed, the D.C. Circuit explicitly rejected the United States' arguments as "irrelevant." *FG Hemisphere Assoc.*, 637 F.3d at 380.

Plaintiffs' moving brief, the overwhelming weight of authority supports the position that a sovereign can be held in contempt and sanctioned for violating court orders. *E.g.*, *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011); *Autotech Techs. LP v. Integral Research & Dev.*, 499 F.3d 737, 744-45 (7th Cir. 2007); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *Servaas Inc. v. Republic of Iraq*, No. 09 Civ. 1862, 2014 WL 279507 (S.D.N.Y. Jan. 24, 2014); *Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148 (D.D.C. 2013); *Export-Import Bank of the Republic of China v. Grenada*, No. 06 Civ. 2469, 2010 WL 5463876, at *2-4 (S.D.N.Y. Dec. 29, 2010); *Belize Telecom Ltd. v. Government of Belize*, No. 05 Civ. 20470, 2005 U.S. Dist. LEXIS 18592 (S.D. Fla. Apr. 12, 2005).

Third, the FSIA does not provide Argentina immunity from contempt sanctions. The Supreme Court, in rejecting Argentina's contention that the FSIA shielded it from discovery with respect to its assets located overseas, recognized that, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's Text … [o]r it must fall." *Id.* at 2256. In that case, since the Federal Rules of Civil Procedure allowed the discovery sought by Plaintiffs, Argentina was not immune by virtue of the FSIA. The same analysis is applicable with respect to contempt sanctions against a sovereign: the law is clear that because a party can be held in civil contempt for violating a court order and because the FSIA does not expressly provide otherwise, this Court has the power to hold Argentina in Contempt. While the FSIA does "provide[] that a foreign state's property in the United States is immune from attachment, arrest, and execution except as provided for by the Act" (*NML Capital, Ltd.*, 134 S. Ct. at 2256),

the imposition of sanctions does not constitute an "attachment, arrest, [or] execution." Nowhere in the FSIA does it provide that Argentina would be immune from contempt sanctions.[3]

In support of its argument that sanctions are unavailable under the FSIA, Argentina cites only *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006) (Opp. Br. at 5-6, 8). Argentina's reliance on *Af-Cap* is misplaced, however, as the Fifth Circuit addressed the propriety of a district court's entry of a turnover order, a form of *execution* available under Texas law. *Id.* at 423, 426. Because the Republic of Congo had not waived immunity, the court held that the district court did not have jurisdiction over the sovereign under the FSIA and therefore vacated the turnover order. *Id.* at 426-27. Here, by contrast, Plaintiffs do ***not*** seek to execute on their judgments through an entry of sanctions. Rather, Plaintiffs merely seek that sanctions be entered to coerce the Republic's compliance with the Court's numerous Orders directing Argentina to cease its efforts to evade the Court's *pari passu* injunction. (*See* Point I, *supra*.) Thus, Plaintiffs' requested relief is entirely distinguishable from that in *Af-Pac*, where the plaintiff sought to execute on its judgment through the imposition of sanctions.

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[3] As the Supreme Court recognized, Argentina and the Government's concerns would be appropriately addressed by Congress:

> These apprehensions [about the supposed intrusions on comity or sovereignty] are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.

Id. at 2258.

III. ARGENTINA ERRONEOUSLY CONFLATES THE IMPOSITION OF CIVIL CONTEMPT SANCTIONS WITH EXECUTION.

Argentina's effort to conflate the ***imposition*** of civil contempt sanctions with the ***enforcement*** of sanctions or execution of a judgment (Opp. Br. at 5), has been repeatedly rejected by other courts, including by the Court of Appeals for the District of Columbia Circuit in *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 376-77 (D.C. Cir. 2011).

In *FG Hemisphere Assocs.*, the Democratic Republic of Congo argued that contempt sanctions were not available under the FSIA because "a court is quite limited in ***executing*** a judgment against a foreign sovereign," and because "no provision of the FSIA explicitly permits a plaintiff to execute on a sovereign's assets to enforce a contempt order." *Id.* at 377 (emphasis added). The D.C. Circuit rejected that argument because it "conflate[ed] a contempt order with an order enforcing such an award through execution" because "the district court ha[d] not attempted to execute on its contempt order."[4] *Id.* Moreover, the court reasoned that because the FSIA "explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment," it was "not anomalous to divide, as [plaintiff] d[id], the question of a court's power to impose sanctions from the question of the court's ability to enforce that judgment through execution." *Id.* Accordingly, the court held that "the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign." *Id.* at 380. *Accord Autotech Technologies LP v. Integral Research & Dev.*

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[4] Nor did the court in *FG Hemisphere* find persuasive the Congo's argument that "a court should not issue an unenforceable order." *Id.* at 379. Such an argument, the court reasoned, "simply quarrels implicitly with the statutory scheme" of the FSIA, "and therefore c[ould] be easily dismissed." *Id.*

Corp., 499 F.3d 737, 744 (7th Cir. 2007) ("Nothing in the text of the FSIA comes close to suggesting that the FSIA was designed to abrogate or limit this essential power, or even that a separate jurisdictional showing is necessary for a contempt proceeding that arises within a case properly brought under the FSIA.").

Indeed, Argentina's contention that the court cannot ***enter*** a contempt order for monetary sanctions because the court may later be unable to ***enforce*** that order through attachment or execution misapprehends the FSIA. The FSIA vests in foreign sovereigns two types of immunity: immunity from jurisdiction and immunity for execution. The entire premise of this distinction is that courts may sometimes enter orders that could prove to be unenforceable. To provide just one example, consider the numerous money judgments entered against Argentina; the fact that it is very difficult to collect on a money judgment against a sovereign does not mean the Court cannot enter it). Were it the case that an inability to enforce an order was a legally sufficient reason not to enter that order, Congress's distinction would be superfluous. Indeed, that is core lesson of the Second Circuit's holding in *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984)).

IV. THE UNITED STATES' POSITION IS NO BAR TO IMPOSING CIVIL CONTEMPT SANCTIONS.

Argentina's reliance on the United States' recent *amicus curiae* brief in a case before the Second Circuit is equally unavailing. As an initial matter, there, "[t]he United States ***[wa]s not arguing*** that U.S. courts lack inherent equitable authority or jurisdiction to entertain contempt proceedings against foreign states." U.S. Br. in *SerVaas Inc.*, No.-14-Civ.385, 2014 WL 465925, at *18 (2d Cir) (emphasis added). Instead, the United States merely argued that "district courts err" in imposing sanctions against sovereigns "in this context." *Id.* Moreover, the arguments advanced by the United States have been rejected repeatedly by other courts.

Indeed, the United States' intervention on behalf of sovereigns has not prevented courts from finding sanctions available and appropriate to curtail sovereigns' contemptuous conduct. The United States has filed *amicus curiae* briefs on behalf of several sovereigns arguing variously that the FSIA does not permit the imposition of sanctions and that sanctions are inadvisable for foreign policy and comity concerns. *FG Hemisphere*, 637 F.3d at 376-77; *Chabad v. Russian Fed'n*, 915 F.2d 148, 151 (D.D.C. 2013). Yet the United States' position has not prevented those courts from finding sanctions appropriate. *FG Hemisphere*, 637 F.3d at 380; *Chabad*, 915 F. Supp. 2d at 154-55.

In any event, the Supreme Court's *NML* decision squarely rejected the arguments made by the United States in the briefs that Argentina cites. As previously explained, the Supreme Court held that, with respect to foreign sovereigns, courts retain all of the powers they have with respect to private parties unless the FSIA *expressly* provides otherwise.

CONCLUSION

For the foregoing reasons, as well as those set forth in its moving papers, Plaintiffs respectfully request that the Court hold The Republic of Argentina in civil contempt, impose the requested sanctions, and grant such other and further relief as shall be just and proper.

Dated: New York, New York
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